No. 5375

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

LOUIE WAH YOU,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration at the Port of San Francisco, California,

Appellee.

BRIEF FOR APPELLEE

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STATEMENT

Louie Wah You appeals from the order of the District Court of the Northern District of California dismissing his petition for a writ of habeas corpus filed therein. The proceeding was instituted to test the validity of the order of the Commissioner of Immigration at the Port of San Francisco denying his application for entrance into the United States.

On September 2, 1927, one Louie Choon filed on behalf of appellant a petition for a writ of habeas

corpus setting forth that he was detained by the Commissioner of Immigration at the port, and that the detention was illegal; that appellant arrived at the port on June 30, 1927, SS. "President Pierce", and made application for entrance into the United States as a citizen by virtue of being the foreign born son of Louie Choon, who was a native born citizen of the United States; that his application was denied by a Board of Special Inquiry; an appeal taken therefrom to the Secretary of Labor was dismissed. It was thereupon alleged that the order was in excess of the authority of the Immigration officials in that:

a) The evidence was of such a conclusive character that it was an abuse of discretion not to follow it;

b) That the adverse decision was based solely upon a question of law, to wit, that appellant was the illegitimate child of petitioner at the time of his birth, and as such could not become a citizen of the United States under the provisions of Section 1993 R. S.

It is further alleged in the petition upon information and belief that one Suey Ying, prior to her marriage to petitioner in 1903, was married to another, and that she left him and married petitioner without having secured a divorce, and thus was not his lawful wife, it being set forth that the illegitimacy of appellant results from the circumstance that previous to an alleged marriage to his mother in 1904 petitioner had been married to Suey Ying in 1903 and not divorced.

It is further alleged upon information and belief that had Suey Ying secured a divorce from petitioner in 1910, and that thereupon the mother of appellant

became the wife of petitioner but not before, and that petitioner was born thereafter. An order to show cause having been issued upon the petition, the respondent demurred thereto from want of facts; at the hearing the petition was by stipulation deemed amended by making immigration records "A", "B", "C", "D", "E" and "F" a part thereof, thereupon the demurrer was overruled and the writ was issued. On October 22, 1927, the respondent made a return thereto denying the material statements of the petition, alleging in substance that at the time of the birth of appellant he was not legitimate. There was no traverse to the return; the matter coming on for further hearing, upon consideration the writ was discharged, the petition denied, and the detained remanded for deportation.

The court filed an opinion (R. 19), wherein it places its decision upon the authority of the case of

Ng Sue Hi v. Wedin, 21 F. (2d) 801.

Upon the arrival of appellant at the port his case came before a Board of Special Inquiry, which heard the testimony of himself, his alleged father, Louie Choon, and an alleged previously landed brother. The related records referred to were also considered; at the conclusion thereof the board made the following summary of the case: (Ex. "A" 10)

"26012/3-7 July 14, 1927.
By Chairman:

This applicant gives his age as 13 years, claiming birth C. R. 4-2-18 (Apr. 2, 1915) in the Kew How Village, S. N. D., China, is applying for admission as the son of Louie Choon, alias Louie Gar Foo, a native born citizen.

The alleged father states that he is 50 years old, born in Sacramento, Calif., and has made three trips to China. He is identified by S. F. File 24758/4-7 which shows his admission at this port June 27, 1905, ex SS. Manchuria; departure Oct. 30, 1913, and return Nov. 30, 1914; departure Nov. 1, 1924, and return Jan. 13, 1926, ex. S.S. Pres. Taft, all trips made as a native. The second trip of alleged father is the essential trip for paternity of a son of the same age as applicant.

There is one P. L. alleged brother of the applicant who arrived at this port Sept. 7, 1915, ex. SS. Korea at which time he was admitted as a dependent member of his father's family. The P. L. alleged brother, Louie Wah Him, has made two trips to China since his admission in 1915, departing on his first trip Dec. 10, 1919 and returning July 22, 1921, at which time he was admitted on Form 430. He departed on his second trip May 13, 1922 and returned May 19, 1925 on Form 430. The P. L. alleged brother appeared as a witness in the present case.

The records and testimony of alleged father in the present case show that the alleged father was married twice; that he married his first wife Suey Ying when he was about 23 or 24 years old, or about 1903, and that he married his second wife, Toy Shee, in KS 30-10-20 (Nov. 26, 1904) in China, at which time his first wife was still living and from whom he had never been divorced. S. F. File 10739/5594 covers Suey Ying, the alleged father's first wife, and it will be noted in said file that Suey Ying testified at this Station Mar. 4, 1912 that she married Louie Quock, alias Louie Chin (alleged father in present case) when she was 29 years old at the Presbyterian Mission. It will also be noted in her testimony of that date that she had never been divorced from Louie Quock, alias Louie Chin (alleged father in the present case) and further that Louie Quock, alias Louie Chin had married another woman in China while he was still married to her. No children

were born by the alleged father's first wife, Suey Ying.

The alleged father when testifying in the present case first stated that he had only been married once to Toy Shee, his present wife. However, when confronted with the testimony of Miss Donaldina Cameron in File 10739/5594 he changed his testimony and stated, "That is right" but that his first wife left him. He identified the photograph of Suey Ying as that of his first wife and admitted that at the time of his marriage to Toy Shee he had not been divorced from his first wife. As the record shows that at the time of the birth of the present applicant the alleged father had two wives then living, at least no evidence had been submitted to show that his first wife was not living.

At the time that the P. L. alleged brother arrived at this port in 1915 his case was submitted to the Bureau for a decision, as the records at that time showed that the alleged father was married to a woman residing in the United States and that he subsequently, and without divorcing that wife, married the mother of the alleged P. L. brother, there being no evidence that the first wife died before the second marriage was contracted, and the P. L. alleged brother was an illegitimate child. The Bureau in its letter of Nov. 24, 1915, after duly considering the case of the alleged P. L. brother, File 24212/4-9, admitted the P. L. alleged brother as a dependent member of his father's family.

In view of the fact that the alleged father had a wife living at the time he married his second wife, having never divorced his first wife, it is my opinion that this applicant is not entitled to admission as the son of a native, for the reason that he was born to his alleged father's second wife and therefore an illegitimate child.

Testimony was taken in the present case from the alleged father, P. L. alleged brother and the applicant and the following discrepancies have been developed:

(1) Alleged father testified he departed on his last trip to China in 1924 and returned in 1925. His file shows his departure from this port Nov. 1, 1924, on his last trip. P. L. alleged brother testified that he departed on his last trip to China in C. R. 11 (1922) and his file (24212/4-9) shows his departure May 13, 1922 and return May 19, 1925. Applicant testifies that his alleged father and his alleged P. L. brother both arrived home together on their last visit to China. According to the testimony and records the P. L. brother departed about two years before his alleged father.

(2) Alleged father testifies that while he was last home in China he visited the graves of his parents and further states that the graves of his parents are marked with a headstone bearing their names. P. L. alleged brother agreed with his father regarding the visit to the graves of his grandparents and states that the graves are marked with a headstone bearing the name "Louie Toon Sin". Applicant testifies that he visited the graves of his grandparents in company with his father and alleged P. L. brother, but that the graves of his grandparents are not marked in any manner, and further stated that he was positive on that point. Alleged father on recall states that "probably the grass was so tall that it hides the gravestone" and it is possible the applicant did not notice the gravestone for that reason.

(3) Alleged father testifies that there are five houses on the first row counting from the tail of the village and that his house is the fifth house. He further testifies that there is a space between each house on his row. On recall alleged father testifies that there is a space of about seven or eight feet between the first and second houses on his row, and further that the space between the second and third houses and the third and fourth houses in his row was about the same. P. L. alleged brother testifies there is a space between the houses in the first row counting from the tail and on recall the P. L. alleged brother states that there is a space

of about seven or eight feet between the first and second houses on the first row counting from the tail and that the space between the second and third houses and the third and fourth houses is a little more narrower. Applicant testifies that the houses in the first row from the tail all touch except the fourth and fifth houses which has a space between them of about four or five feet.

It is my opinion, in view of the discrepancies cited above, that the relationship of this applicant to his alleged father has not been reasonably established and further that he cannot be considered as the son of a native born citizen, for the reason that he is a son of a plural wife, it being established that his alleged father had a wife living from whom he had not been divorced at the time he married his second wife whom he claims is the mother of the present applicant; nor has the burden of proof as required by the Immigration Act of 1924 been sustained, and I therefore move that this applicant be denied admission to the United States."

Thereupon an appeal was taken to the Secretary of Labor, which came before the Board of Review, which upon consideration gave the following opinion: (Ex. "A" 45)

"55621/181 SAN FRANCISCO August 27,1927.

In re: LOUIE WAH YOU, aged 12.

This case comes before the Board of Review on appeal from a decision of a Board of Special Inquiry at San Francisco denying Louie Wah You admission as a citizen, i. e., as the foreign born son of a native of the United States.

Attorney Roger O'Donnell has filed a brief and argued the case orally before the Board of Review. Attorney W. G. Becktell represents the applicant at San Francisco.

Louie Wah You is applying for admission as the son of Louie Choon, alias Louie Gar Foo, whose American birth and citizenship are conceded. Le-

gal relationship is, therefore, the only issue in this case. Testimony has been taken from the applicant, from his alleged father, and from a prior landed alleged brother.

The record contains three discrepancies on matters with which it would seem these three persons should be conversant. However, two of these are at least partially explained and, perhaps, the other is not of sufficient importance to disprove relationship.

The real ground for denying admission to Louie Wah You is that the evidence shows that his father was married at the Presbyterian Mission at San Francisco about 1903 to an American born Chinese woman named Jeung Suey Ying, alias Jeung Soon Shoy (Toy), alias Jeung Gum Foon, who is not the mother of this applicant. She had previously been married, and the attorney has contended that her marriage to this applicant's alleged father was void ab initio, either because she had not been properly divorced from her first husband or because the divorce had been obtained less than a year before the second marriage. There is no evidence in the record or in any of the exhibits to show that she had not been properly divorced, and the only evidence that the divorce was less than a year before her remarriage is a casual statement made by her when testifying in 1912 that she had lived with her husband until about three years before the San Francisco earthquake and fire.

It is not believed that this is sufficient reason for holding that she was really married within one year after being divorced. No legal evidence has been presented to establish the time of either of these events. Furthermore, a marriage must be considered valid unless it is shown to have been invalid. No real evidence has been presented to show that the marriage was void.

Some years after marrying Suey Ying, the applicant's alleged father went to China; and, on his return, he testified that he went to China to get married and to see his mother. He then stated (1905)

that his wife's name was Tong Shee. He has since given her name as Toy (Choy) Shee. It seems probable that this latter name is really the name of the wife he has in China and who is claimed as the mother of this applicant. In 1912 his first wife, testifying in her own behalf, stated that she had consulted an attorney with regard to obtaining a divorce from her husband, but that she did not know the status of the case.

Attorney O'Donnell has taken this as conclusive proof that she obtained a divorce from the alleged father of this applicant, and has argued therefrom that, even if the marriage were not void ab initio, this applicant would be the lawful son of his alleged father because he was born after the divorce of his father's first wife. The Department doubts that such would be the result; but, as the fact of the divorce has never been proved, there is no reason for deciding the legal question at this time.

Inasmuch as the evidence indicates that, if Louie Wah You is the son of his alleged father, he is such by his second wife, whose lawful marriage cannot be conceded on the evidence presented, for the reason that she appears to be a polygamous wife,—

It is recommended that the appeal of Louie Wah You be dismissed.

HOWARD D. EBEY,
Acting Chairman, Secy. & Comr.
Genl's Board of Review.

WCW:EY
So ordered:
A. E. Cook,
Assistant to the Secretary."

It is seen, therefore, that the petition for a writ of habeas corpus sets forth two grounds:

1) That the evidence in support of appellant's claim was so conclusive that the Bureau would be compelled to accept it; and

2) That if accepted, the appellant's citizenship would follow from the facts as a matter of law, and thus that the Bureau made the decision to rest upon an erroneous rule of the law involved.

The right of appellant to enter the United States contended for involves the three propositions:

1) The nativity and citizenship of the alleged father, Louie Choon;

2) The blood relationship of appellant to Louie Choon; and

3) That he was of such legitimate birth that being born abroad of Louie Choon he also became a citizen.

The first proposition is conceded. The second—the relationship of appellant to Louie Choon—was decided adversely by the Board of Special Inquiry in view of the character of the testimony, although the Board of Review rather intimated the contrary view without discussion. As to the third point, it is contended by the Bureau of Immigration that upon the conceded facts appellant was born in China and was of illegitimate birth, and that therefore, even if he may have been the son of an American citizen, under the holding of this court in the Ng Sui Hi case he would not have become a citizen under the provisions of Section 1993 of the Revised Statutes; and finally, that such an application of the authority would not be prevented on any contention that subsequent to such illegitimate birth appellant may have been legitimated under the law of the State of California.

ARGUMENT

I

THE APPELLANT IS NOT A CITIZEN OF THE UNITED STATES; HE WAS BORN IN CHINA, AND, IF THE NATURAL SON OF LOUIE CHOON, HE WAS OF ILLEGITIMATE BIRTH.

It is undisputed that Louie Choon is a citizen of the United States by birth. It is shown that at all times Louie Choon, born at Sacramento, California, had been domiciled in the United States as a citizen thereof. It is disputed that appellant is the son of Louie Choon, a point to be considered below. But if it be taken that he was such son, it is undoubted that he was of illegitimate birth. He was born in China, April 2, 1915; it appears without dispute that Louie Choon, the alleged father of Louie Wah You, was validly married at Oakland in 1903 to one Jeung Suey Ying. Thereupon he departed for China on October 13, 1904, returning on June 27, 1905. During this visit to China, to wit, on November 26, 1904, Louie Choon claims to have married one Toy Shee. At that time the wife he had previously married was still living and undivorced. It is claimed that as the result of this alleged marriage with Toy Shee there was born an elder son—Louie Wah Him. Louie Choon made a subsequent trip to China, departing at the end of 1913, returning November 30, 1914, and four months subsequent to his return, April 2, 1915, appellant was born, as it is claimed, to the said Toy Shee and Louie Choon. It is shown, if it be relevant, that a final decree of divorce was rendered on January 20, 1914, divorcing Louie Choon, and the said first wife under different names, the ac-

tion having been commenced June 3, 1912, and the complaint reciting that the parties had intermarried May 1, 1903, and had been husband and wife up to the divorce. This decree, while made a part of the habeas corpus proceedings and the petition and return, was not a part of the case before the immigration authorities. It would reenforce, however, the showing before the immigration authorities as to there being a valid marriage between Louie Choon and the first wife. The fact that it was entered prior to the birth of the appellant would not be significant, it not being contended that in the meantime there was any valid marriage between Louie Choon and Toy Shee. In fact it is conceded in the brief that there was not. (p. 14)

The appellant does not show any ground for his admission into the United States other than that he was a citizen thereof on account of being born of an American father, although born abroad.

Accordingly we have at the threshold the precise situation ruled upon in the case of

Ng Suey Hi v. Weedin, 21 F. (2d) 801.

The ruling of the district court, as it appears from the opinion in the record, was based upon the authority of that case. (R. 19) It is there held that the provisions of Section 1993 of the Revised Statutes, would not have the effect of making one born abroad a citizen, although the child of a citizen, unless the birth was legitimate. No argument is now submitted as against the authority of this decision, nor is the court asked to re-examine it. The rule so announced is believed to

be the general law on the subject. We have found no reported case to the contrary.

The same rule was applied, however, by the Supreme Court of Maryland in 1864 in the case of

> Guyers' Lessee v. Smith and Thompson, 22 Ma. 239.

That case involved real estate, the point under discussion being the question of an escheat, and it turned out to be material to know whether the plaintiff's lessors were citizens of the United States. It appeared that the property was formerly owned by John Guyer, a citizen of the United States, who died abroad, and that the two sons, lessors of the plaintiff, were the children of Guyer and one to whom he was not lawfully married, and therefore illegitimate. The court said:

> "In the opinion of this Court, the claim of the appellants is not protected by the 4th section of the Act of Congress passed April 14th, 1802. That Act declares, 'that the children of persons who are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States.' These appellants claim the benefit of that section as the children of John Guyer, who was a citizen of the United States. But the proof shows that they were not born in lawful wedlock, they are there illegitimate; under our law *nullius filii,* and clearly therefore not within the provisions of the Act of 1802."

The further contention is made that in the instant case under the facts appellant became legitimated, the argument being that Louie Choon was domiciled in California and according to the California laws an illegitimate child was rendered legitimate by the father

> "Publicly accepting it as his own, receiving it as such with the consent of his wife, if he is married, into his family and otherwise treating it as if it were a legitimate child",

and that he

> "Thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth".

But as to this, we contend that if Louie Wah You was not a citizen of the United States at the time of his birth, he could not, as the authority would show, become so thereafter under any species of adoption or legitimation. Indeed, the case cited would be authority in support of our contention, for it is said in response to a similar claim:

> "On principal it would seem that the appellant was a citizen of the United States at birth or not at all. She was then either a citizen of the United States or a subject of China. If the latter, it is by no means clear how she could become a citizen by any act of her parents, unless authorized by some act of Congress."

It is true that the opinion thereupon proceeded to discuss the point that even a legitimation was not shown, but this would present merely the frequent case where an opinion proceeds upon two grounds, thereby becoming an authority upon both grounds.

> Union Pacific R. Co. v. Mason City & Ft. Dodge R. Co., 199 U. S. 160, 166.
>
> United States v. Title Insurance and T. Co., 265 U. S. 472, 486.

But the declaration of the court is sustainable both on principle and authority. One who is an alien at the

time of his birth, being born abroad, can only become a citizen of the United States through some species of naturalization, and this in turn must be under the authority of Congress declared either by a treaty or statute; the authority of Congress in that behalf is to "adopt a uniform rule of naturalization". It therefore cannot be admitted that the Congress can surrender to any state the power to make aliens citizens of the United States through any species of adoption or legitimation, either through a general statute or in any particular case. Although it may well be that a state would have complete control of the question of what method or under what circumstances one born illegitimately may assume the character of one of legitimate birth, these plans may be varied, one having no such rule, another having a particular proceeding, or one leaving it to the agreement of the parties. It cannot be contemplated that it would be in obedience to the constitutional mandate to Congress, for Congress to authorize any such state acts of legitimation to constitute naturalization of an alien. The rule would lack uniformity and thus be invalid, but in particular it is sufficient to say that Congress has not by any act authorized any such species of naturalization.

A case throwing much light upon the point under discussion is the case of

Elk v. Wilkins, 112 U. S. 94, 28 L. Ed. 643.

In that case Elk, an Indian, was born of a tribe still maintaining tribal relations, and thus one who, although born within the limits of the United States, did not become a citizen thereof at birth, in that he was not

born "under the jurisdiction" of the United States. We might say that it could well be contended in the case of such Indians that they were born under such jurisdiction, but the cases have ruled otherwise.

> McKay v. Campbell, Fed. Cas. No. 8840.
> In re Sahquah, 31 Fed. 327.

The court was proceeding on the assumption that one so born was not a citizen of the United States. It was contended, however, that subsequent to the birth of Elk he had completely surrendered himself to the jurisdiction of the United States; that he had severed all tribal relations and no longer lived as one of the tribe, and that therefore he was a citizen. It was answered:

> "Thereof the plaintiff alleges that he had fully and completely surrendered himself to the jurisdiction of the United States. He does not allege that the United States accepted his surrender or that he has ever been naturalized or taxed, or in any way recognized or treated as a citizen by the state or by the United States. Nor is it contended by his counsel that there is any statute or treaty that makes him a citizen."

It was held that Elk was not a citizen of the United States.

It was declared:

> "They (the Indian tribes) may without doubt like the subjects of any foreign government be naturalized by the authority of Congress and become citizens of a state of the United States; and if an individual should leave his nation or tribe and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an immigrant of another foreign people."

> "But an immigrant from any foreign state cannot become a citizen of the United States without a formal renunciation of his own allegiance and an acceptance by the United States of that renunciation through such form of naturalization as may be required by law."

In the case of

United States v. Osborn, 2 Fed. 58, 61,

Judge Deady had under consideration the same point, it being contended that an Indian born in tribal relations, concededly for that reason not a citizen of the United States, had thereafter become such, said:

> "But an Indian cannot make *himself* a citizen of the United States without the consent and cooperation of the government. The fact that he had abandoned his nomadic life or tribal relations, and adopted the habits and manners of civilized people, may be a good reason why he should be made a citizen of the United States, but does not of itself make him one. To be a citizen of the United States is a political privilege, which no one not born to can assume without its consent in some form. The Indians in Oregon, not being born subject to the jurisdiction of the United States, were not born citizens thereof, and I am not aware of any law or treaty by which any of them have been made so since."

In the Ng Suey Hi case, the district court had held against the contention of citizenship of the appellant upon the theory that she had become expatriated through her marriage to a Chinese national. This court pointed out that this contention would lack sufficient support in the evidence so that the decision of this court was made to rest upon the holding that the woman had never become a citizen of the United States.

As we have seen, appellant did not become a citizen *by birth,* nor did he become a citizen *at birth.*

Ng Suey Hi v. Weedin, supra.

If he became such citizen under any circumstances since birth, it would be by some species of naturalization under the authority of Congress. But when would such naturalization have been accomplished? If upon his own contention as to legitimation, at what point would such legitimation have made him a citizen? Indeed, he invokes the provisions of the California Statute and would claim that by species of "relation" since he became legitimate from birth, he would have been a citizen from birth. But cannot it be claimed that Congress could have contemplated any such contingency? One is not a citizen today, yet years hence, under some state proceeding, by relation, be deemed to be a citizen from some point of time already passed. It may be feasible under the doctrine of "relation" to carry the point of legitimacy back as between the parties involved, the parent and child. But such doctrine of relation is artificial at best, and can never be applied to affect the interests of third parties. So here, it could not by "relation" be held as against the third party, the United States, to make appellant one of its citizens as of an earlier date. Thus the doctrine, while it may be applied with vigor in a proper case between original parties, it is never taken to effect the interests of third parties or strangers.

Johnston v. Jones, 66 U. S. 209, 17 L. Ed. 117.

II

THE APPELLANT WAS NEVER IN FACT LEGITIMATED UPON ANY RULE.

In addition to the ground referred to, the court also held that there was no evidence of legitimation, and we think it quite likely that the situation was the same as in the instant case. The type found is almost universal; a Chinese domiciled in the United States goes to China, married validly or invalidly, and returns, leaving a wife in China. Children are born; they are always recognized and declared to the immigration service in arrivals or departures; the children are with the mother; the Chinese father visits them at long intervals in China, and may for a time abide in the same residence, although the children are never brought to the usual abode of the father in this country. So that if there were no legitimation in the case cited, there would be none in the instant case.

In the instant case counsel is at pains to show, which is conceded, that Louie Choon was a resident of, and domiciled in the United States (pp. 12, 13). It is shown also and pointed out that the residence of Louie Choon in 1913, in 1924, and in 1926, and presumably at all intervening times, was at No. 909½ Third Street, Sacramento, Cal. That would be, at all of that time, the legal residence and domicile of the alleged father, yet it is undisputed that he never brought appellant to that residence or domicile or home. Accordingly, one of the essential conditions of the alleged legitimation was never met.

It is claimed further that the boy was publicly ac-

knowledged. As far as the evidence goes, these public acknowledgments were made to the immigration officials incident to their examinations upon the arrival or departure of the Chinese person. The details of such record are, perhaps, required by regulations rather than any positive statute, but in a very important sense they lack publicity; while acknowledgments, they are not public acknowledgments in that, according to the strict regulations of the Department such records are to be kept from the public to the end that the officials may refer to it and use them to prevent fraud. So we say that the word "publicly" in the statute relied upon must have some meaning, and we think it must be held to mean some declaration made in some manner that would have a public aspect as distinguished from such a private declaration to be recorded in a sealed record.

But passing this phase of the matter, we think it is clear that it is not shown that the appellant was received in the home of Louie Choon. Reliance is made upon the California case of Blythe v. Ayres, 96 Cal. 532. But the later case of the

Estate of De Laveaga, 142 Cal. 158,

is more pertinent. In that case it was held upon a set of circumstances not distinguishable from that contended for in the instant case that there was no legitimation in that the illegitimate was not taken into the home of the putative father. It is significant further that the later case in commenting upon the Blythe case makes the following statement: (p. 169)

> "In Blythe v. Ayres, 96 Cal. 557, in an opinion by one of the justices, there were views expressed

> contrary to those above stated; but these views were unnecessary to the decisions of the case, and, moreover, were concurred in by only two of the other justices. Justice McFarland, whose concurring opinion was signed by Justice De Haven, concurred in the judgment on the ground that the plaintiff therein was heir of the deceased under section 1387 of the Civil Code, but says: 'I dissent from the proposition that plaintiff was adopted by deceased under section 230. . . . How can there be a compliance with a statute in the absence of conditions contemplated by the statute, and absolutely necessary to give it effect? The provision of the code in question assumes the existence of a family; and it assumes that there may be a family in which there is no wife, because it provides that if there be a wife she must consent to receive the illegitimate child into the family. . . . There must, however, be a family into which the child can be received; and when that condition is not present, the provision of the code under discussion can have no operation.' ''

In the Jones case it was shown that the father received an illegitimate for a period into his real home as distinguished from the abode of the mother. It would not be a case of the father departing from his home and abiding for a temporary period in the home of the mother. If the legitimation is to be tested by the laws of California, and the father is concededly domiciled there, we think it must be clear that his home constituting such domicile, if he has any, is the home into which the minor must be received. Reference may be had to counsel's attempt to show that there would be no public policy involved other than one in support of a liberal rule for such legitimation. In reply we cite the court to the observations of the Supreme Court of the State in the same De Laveaga case, commencing

with the second paragraph of page 170, et seq., concluding with the language:

> "Also by the same court, in Maynard v. Hill, 125 U. S. 190, speaking of marriage, it is said: 'It is an institution in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.' As already said, the legislature in adopting section 230 of the Civil Code has gone as far as public policy will justify, and the court does not feel inclined—even if it had the right to do so—to go beyond the plain language of the law declared by the legislature in this respect."

III

THE EVIDENCE IN THE RECORD WAS NOT SUCH AS TO COMPEL THE IMMIGRATION BUREAU TO FIND THE TRUTH OF THE ALLEGED RELATIONSHIP.

The Board of Special Inquiry, while recognizing the rule hereinabove discussed, also found against appellant upon the issue of relationship. It is said that in view of the discrepancies cited, the relationship has not been reasonably established.

It is true that the Board of Review said of the discrepancies that it would seem that there were discrepancies on matters on which the parties should be conversant, but that two are at least partially explained, but perhaps the other is not of sufficient importance to disprove relationship.

As to this we say, that the proceeding being exclusion rather than deportation, the trial body is the Board of Special Inquiry rather than the Secretary, his function

being appellate, and the decision of the trial body should be sustained upon any ground.

Looking to the record, it will be noted that the witnesses were all more or less interested, being the alleged father, the alleged previously landed brother, and the applicant. As to the father, his testimony in any just view was discredited by the circumstance that he was ready to testify falsely at the hearing as to his marital status. Thus he denied that he had ever married the first wife and persisted in such denial until his attention was called to the contrary testimony of the wife and Miss Cameron. (Ex. "A" 23) He would indeed be discredited by his final admission of facts, which would have shown him to be guilty of bigamy. In addition to this the Board could have given some consideration to the discrepancies noted between his testimony and that of applicant. As we have heretofore urged, the Board has the right to take into consideration that in the administration of that particular government service, fraud is encountered. It is to be accepted that parties intending such fraud will have some previous rehearsal. It may be inferred that the most natural rehearsal for the relationship here contended for would be to have the alleged son live for a time in the father's village and note the surroundings, houses, rows, etc. He is to be coached in the names and present whereabouts of the members of the family tree. Accordingly, agreement as to such matters need not be considered significant. But if the officials carry the examination back far enough, a discrepancy may be found, such as the one in the instant case.

with the second paragraph of page 170, et seq., concluding with the language:

> "Also by the same court, in Maynard v. Hill, 125 U. S. 190, speaking of marriage, it is said: 'It is an institution in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.' As already said, the legislature in adopting section 230 of the Civil Code has gone as far as public policy will justify, and the court does not feel inclined—even if it had the right to do so—to go beyond the plain language of the law declared by the legislature in this respect."

III

THE EVIDENCE IN THE RECORD WAS NOT SUCH AS TO COMPEL THE IMMIGRATION BUREAU TO FIND THE TRUTH OF THE ALLEGED RELATIONSHIP.

The Board of Special Inquiry, while recognizing the rule hereinabove discussed, also found against appellant upon the issue of relationship. It is said that in view of the discrepancies cited, the relationship has not been reasonably established.

It is true that the Board of Review said of the discrepancies that it would seem that there were discrepancies on matters on which the parties should be conversant, but that two are at least partially explained, but perhaps the other is not of sufficient importance to disprove relationship.

As to this we say, that the proceeding being exclusion rather than deportation, the trial body is the Board of Special Inquiry rather than the Secretary, his function

being appellate, and the decision of the trial body should be sustained upon any ground.

Looking to the record, it will be noted that the witnesses were all more or less interested, being the alleged father, the alleged previously landed brother, and the applicant. As to the father, his testimony in any just view was discredited by the circumstance that he was ready to testify falsely at the hearing as to his marital status. Thus he denied that he had ever married the first wife and persisted in such denial until his attention was called to the contrary testimony of the wife and Miss Cameron. (Ex. "A" 23) He would indeed be discredited by his final admission of facts, which would have shown him to be guilty of bigamy. In addition to this the Board could have given some consideration to the discrepancies noted between his testimony and that of applicant. As we have heretofore urged, the Board has the right to take into consideration that in the administration of that particular government service, fraud is encountered. It is to be accepted that parties intending such fraud will have some previous rehearsal. It may be inferred that the most natural rehearsal for the relationship here contended for would be to have the alleged son live for a time in the father's village and note the surroundings, houses, rows, etc. He is to be coached in the names and present whereabouts of the members of the family tree. Accordingly, agreement as to such matters need not be considered significant. But if the officials carry the examination back far enough, a discrepancy may be found, such as the one in the instant case.

Appellant was asked if his father and brother had reached China together, and he answered that they did; while on the contrary the records show that their arrivals in China were, perhaps, two years apart; this incident would have been two years prior to his examination.

The visit to the graves of the grandparents has similar significance. He may have been told of the incident; but asked to describe the detail of the grave markings, he said that there was no headstone, which the others agree to have been upon the graves. The explanation that grass may have grown up is not convincing. One actually at the grave would have noted the headstone, if it were a jungle. In any event, and we urge this consideration in all of these inquiries: We think that whether an explanation of an apparent discrepancy is reasonable or credible, is essentially a question for the trial body; different views may be taken by reasonable men.

There was a discrepancy further as to the spaces between the houses in the rows in the home village where applicant claims to have been born. The father and previously landed brother recognized separations; the applicant testified that certain of the houses touched each other. This precise discrepancy was held by this court to have been significant in the case of

Jeung Bock Hong v. White, 258 Fed. 23.

Upon the whole, we therefore say that in addition to the point hereinabove discussed, and upon which the officials deemed the case to properly turn—that of citi-

zenship of an illegitimate person—the decision of the Immigration Bureau may further be justified upon the ground that the record was not such as to compel the officials to believe the relationship to have been reasonably established.

CONCLUSION

In conclusion, we therefore show that upon the authority of the Ng Suey Hi case, supra, the appellant did not become a citizen of the United States at birth, and it is further clear that he could not have become so thereafter, except by some species of naturalization under the authority of Congress, which, of course, has not been shown; that he cannot qualify by showing his legitimation, even upon the theory contended for by himself; and finally, that the evidence found in the record, considering the discrediting of the principal witness, was not sufficient to compel the officials to accept the relationship as reasonably established.

The order of the district court should be affirmed.

Respectfully submitted,

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